

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DALE B. DEVIN

Claimant

VS.

WESTERN RESOURCES, INC.

Respondent

Self-Insured

Docket No. 222,580

ORDER

Claimant appealed Administrative Law Judge Brad E. Avery's Award dated May 11, 2001. The Board heard oral argument on October 23, 2001, in Topeka, Kansas.

APPEARANCES

Claimant appeared by his attorney, Roger D. Fincher. The self-insured respondent appeared by its attorney, Jeffrey W. Jones.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that if timely notice was provided the matter should be remanded to the Administrative Law Judge for determination of the remaining issues.

ISSUES

The Administrative Law Judge ruled claimant did not provide timely notice of a work-related accident and denied the claim.

The claimant raised the following issues on review: (1) whether claimant gave timely notice of his accidental injury; (2) whether claimant's accidental injury arose out of and in the course of employment with the respondent; and, (3) nature and extent of claimant's disability, if any.

The respondent argues the Administrative Law Judge's finding that claimant failed to provide timely notice should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Dale Devin, claimant, was employed with Western Resources as an auxiliary equipment operator. A previous claim, Docket No. 206,807, was filed for an injury on May 29, 1995, when claimant slipped and fell down some stairs injuring his right knee.

Claimant first saw Chris Fevurly, M.D., regarding the 1995 injury and was later referred for treatment with Richard G. Wendt, M.D. Dr. Wendt first saw the claimant on October 4, 1995, and performed a diagnostic arthroscopy of claimant's right knee on October 10, 1995. Dr. Wendt found loosened cartilage that was removed and then the underlying bone was burred to try to stimulate re-growth of some scar or fibrous cartilage. The meniscus and the ligaments inside the knee were normal.

On November 22, 1995, Dr. Wendt released the claimant to return to work at his regular job duties. Claimant's work day was shortened for a couple of weeks and then he returned to his regular 12-hour days. Claimant reached maximum medical improvement on March 1, 1996. On March 7, 1996, Dr. Wendt rated the claimant with a 12 percent scheduled permanent partial disability to the right lower extremity.

Claimant testified he had complained to Dr. Wendt after his knee surgery that his back was bothering him. However, Dr. Wendt's records indicate the first time claimant complained low lumbar pain was on February 3, 1997.

After Dr. Wendt released the claimant, he returned to his job of an auxiliary equipment operator. Claimant testified his job duties included climbing ladders and stairs; dumping 100 pound bags of lime into tanks; dumping steel balls into a ball mill; and, helping turn valves which required 3 or 4 employees. Claimant testified his knee and back continually got worse. Claimant testified he told all of the shift supervisors that he was having problems with his back and right knee.

Claimant testified that on October 9, 1996, he aggravated his right knee when he stepped in a drain hole with no cover on it and twisted his leg. Dr. Wendt's office notes indicate claimant had a twisting and hyperextension maneuver to his knee from stepping in the hole.

On December 19, 1996, the claimant settled his claim for the injury suffered on May 29, 1995. In addition, at the settlement hearing the claimant specifically agreed to a release of all claims for compensation for any injury claimant may have suffered while an employee of the respondent from the accident date up to and including December 19, 1996. The right to future medical and review and modification was left open.

After December 19, 1996, through his termination in February 1997, claimant testified his back and knee steadily got worse.

On January 24, 1997, a random drug test of claimant came back positive. The claimant was suspended from work on February 18, 1997, pending his decision whether to enter a rehabilitation program pursuant to respondent's policy. Because claimant refused to go into rehabilitation he was terminated from employment on February 23, 1997.

On April 18, 1997, the claimant filed this claim alleging a series of accidents from May 30, 1995, through February 5, 1997. This alleged series of accidents covered much of the same time period as the series of accidents claimant alleged in Docket No. 206,807.¹ As previously noted, the settlement hearing on December 19, 1996, specifically covered all accidents claimant suffered working for respondent through the date of settlement.

CONCLUSIONS OF LAW

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.²

The claimant argues that he advised all of his supervisors that he was having continuing problems with his right knee and back while he continued performing his work duties after the settlement hearing on December 19, 1996, and until he was suspended from work on February 18, 1997.

K.S.A. 44-520 provides:

¹In Docket No. 206,807 the claimant alleged an accident on May 29, 1995, and each and every day thereafter.

²Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520 obligates an employee to notify the employer within ten days after the date of accident regarding the time, place and particulars of the accident.

At the preliminary hearing held on October 8, 1997, claimant testified he did not fill out any employee report of accident between December 19, 1996, and February 23, 1997. Claimant further testified that after the settlement hearing he never reported injury to anyone at respondent. However, claimant missed work after the settlement hearing and testified Bill Martin, Dave Neufeld and Tom Denning were well aware of several times claimant reported things. Claimant also had meetings with Pat Bush, manager of workers compensation and drug testing for respondent, during this period of time.

Dave Neufeld, Bill Martin, Tom Denning and Pat Bush all denied claimant reported any injury between December 19, 1996, and his termination in February 1997.

Although not all the individuals claimant identified as persons he allegedly advised of his continuing problems in the interval after the settlement hearing until his termination from employment, testified, those that did, Mr. Martin, Mr. Neufeld, Mr. Denning and Mr. Bush all denied claimant's allegations that he advised them of any ongoing work-related injury during that short time period. Moreover, Dr. Wendt's medical reports and testimony further contradict claimant's assertions that he had ongoing complaints of back problems. The Board concludes the preponderance of the credible evidence supports the Administrative Law Judge's decision.

The Board finds the Award of Administrative Law Judge Brad E. Avery dated May 11, 2001, should be affirmed as claimant failed to prove that he provided notice to respondent of an accidental injury within ten days as required by K.S.A. 44-520. In

addition, claimant provided no evidence and did not argue that there was just cause for his failure to provide notice. Therefore, the Board finds all benefits from the alleged injuries suffered through February 18, 1997, should be denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 11, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Jeffrey W. Jones, Attorney for Respondent
 Brad E. Avery, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director